

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUTH A. LOCKE

Claimant

VS.

AMARR GARAGE DOORS

Respondent

AND

AMERICAN INTERNATIONAL GROUP

Insurance Carrier

Docket No. 1,003,545

ORDER

Respondent and its insurance carrier (respondent) requested review of the February 16, 2004 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) heard oral argument on June 2, 2004.

APPEARANCES

James L. Wisler of Lawrence, Kansas, appeared for the claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ concluded claimant sustained a 14 percent permanent partial impairment to the body as a whole as a result of her compensable injury. Because claimant had left respondent's employ and was no longer working, the ALJ also considered whether

claimant was entitled to a work disability under K.S.A. 44-510e. The ALJ found claimant sustained a 67 percent work disability based upon a 34 percent task loss and an actual 100 percent wage loss. In assessing the wage loss component, the ALJ specifically held that claimant made a good faith effort to find employment.

The respondent requests review of this decision asserting that both the functional impairment and work disability assessed by the ALJ are excessive under these facts and circumstances. In particular, respondent contends claimant was terminated by respondent for reasons unrelated to her injury. Therefore respondent maintains that under the principles set forth in *Watkins*¹ she is limited in her recovery to a functional impairment which, in respondent's view, should be something less than awarded by the ALJ.

Claimant argues the ALJ's Award should be affirmed in all respects as the evidence substantiates her claim for work disability benefits.

The sole issue for determination is the nature and extent of claimant's impairment, including work disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant injured her neck and right shoulder while working for respondent as a janitor on January 29, 2001. Claimant was treated conservatively and was ultimately referred to Dr. William O. Reed Jr. in July 2001, who diagnosed a probable herniated nucleus pulposus at C7-T1 with degenerative disk disease.² Dr. Reed provided conservative treatment in the form of medication and injections. When those proved fruitless, he recommended surgery at C5-6. Dr. Reed performed a discectomy and cervical fusion at C5-6 on February 27, 2002.³ As part of the surgery, a portion of claimant's hip bone was harvested and used in the fusing process. On April 11, 2002, Dr. Reed released the claimant to return to regular duty with no work restrictions. When deposed, he indicated claimant's neck had "completely healed" as of April 11, 2002 and she was left with some pain at the donor site and limitations in her shoulder. He assigned a 7 percent

¹ *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

² Reed Depo. at 5.

³ Id. at 7.

permanent impairment to the body as a whole based upon the *AMA Guides*.⁴ Dr. Reed testified claimant required no restrictions and that she should be able to perform most any jobs she had done before.⁵

Claimant returned to work at a more sedentary job as a “small bagger”, a position that consisted of bagging parts. Claimant was able to successfully perform this job. However, this job was subsequently outsourced and claimant was required to move to another position. The next job she performed was that of a production worker wrapping bands around garage doors. Claimant experienced difficulty with this job as she had to lift rather heavy garage doors.

In January 2003, claimant was ultimately assigned to the RS stacker position on the second shift. This job was made available to claimant based upon a list of positions that claimant was given. From this list, claimant identified the RS stacker job as one that she thought she could perform.⁶ This job required speed and accuracy, two skills which claimant apparently lacked. Claimant also testified that she hurt each night following her shift.⁷ She testified that the carts she was required to push were too heavy and caused pain in her hip, neck and arm. Claimant was able to work in this job for only 2-3 weeks before she was disciplined for her inaccuracy and lack of production.

According to Kirsten Krug, the human resources manager, claimant was terminated on February 18, 2003, not because of she broke any company rules or policies but because there were just no jobs for her to do at respondent's plant.⁸ Ms. Krug testified that she had worked with claimant to place her in an alternative job both before and after she was terminated and other than the RS stacker and the “small bagger” positions, claimant indicated she was unable to do any of the other jobs contained on the list of positions.⁹ Moreover, there is nothing within Ms. Krug's testimony that indicates whether any of the jobs on the list were available at the time claimant was in need of an alternative position.

On February 26, 2003, claimant was evaluated by Dr. Sergio Delgado, an orthopaedic physician, at her attorney's request. Dr. Delgado diagnosed preexisting degenerative disease which was asymptomatic until claimant's work-related accident,

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the fourth edition unless otherwise stated.

⁵ Reed Depo. at 19.

⁶ Krug Depo. at 8.

⁷ R.H. Trans. at 12.

⁸ Krug Depo. at 12.

⁹ The list of positions is Exhibit 2 to the regular hearing transcript.

along with sensory cervical radiculopathy which required surgical decompression, fusion and a bone graft. Dr. Delgado assigned an impairment based upon DRE Category III, which is a 15 percent permanent impairment to the body as a whole.¹⁰

Dr. Delgado was also asked to consider whether claimant sustained a task loss as a result of her injury. When presented with the task loss analysis prepared by Michael Dreiling, he opined that claimant sustained a 34 percent task loss. This is the only evidence as to claimant's task loss.

Given the lack of an agreement between the parties relating to claimant's functional impairment, the ALJ appointed Dr. Peter Bieri to conduct an independent medical examination. Dr. Bieri saw claimant on July 14, 2003, and her complaints included a decreased range of motion in her neck along with brief palpable muscle spasms and guarding. She also complained of pain at the donor site in her right hip. Dr. Bieri diagnosed discogenic disease at C5-6 with no true radiculopathy and assigned a 14 percent permanent functional impairment to the whole body.¹¹ He imposed restrictions consisting of occasional lifting to 35 pounds, frequent lifting not to exceed 20 pounds and no more than 10 pounds of constant lifting.¹²

The ALJ awarded claimant a 14 percent functional impairment based upon the opinions of the independent medical examiner, Dr. Bieri. This finding is not substantially different from the opinions expressed by each party's respective expert. Under these facts and circumstances, the Board finds no reason to disturb the ALJ's finding. The 14 percent functional impairment is affirmed.

Whether claimant is entitled to additional compensation for what is commonly referred to "work disability" is governed by K.S.A. 44-510e(a). That statute states in part:

. . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . .¹³

¹⁰ Delgado Depo. at 7-8.

¹¹ Bieri Depo. at 7-8.

¹² *Id.* at 8.

¹³ K.S.A. 44-510e(a) (Furse 2000).

The Kansas Appellate Courts, beginning with *Foulk*,¹⁴ have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of her pre-injury wage at a job within her medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decision is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.¹⁵ Before claimant is entitled to work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment.¹⁶

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,¹⁷ where the accommodated job violates the worker's medical restrictions,¹⁸ or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.¹⁹ The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

In this instance, the evidence indicated claimant had sought employment from at least two potential employers per week while receiving unemployment compensation. Because there was no evidence to the contrary, the ALJ found that claimant established a good faith effort to find appropriate employment and awarded work disability benefits based upon her actual 100 percent wage loss.²⁰

The ALJ also found the only evidence of task loss was expressed by Dr. Delgado. He concluded Dr. Delgado's restrictions were "reasonable and appropriate" and as such,

¹⁴ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

¹⁵ *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

¹⁶ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

¹⁷ *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

¹⁸ *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

¹⁹ *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

²⁰ ALJ Award (Feb. 16, 2004) at 4.

he adopted the 34 percent task loss. The average of the 34 percent task loss and the 100 percent wage loss is 67 percent which was awarded.

Respondent takes issue with this aspect of the ALJ's Award. Respondent maintains the case law limits claimant's recovery to her functional impairment because respondent accommodated claimant and made every effort to treat her fairly. But when claimant was unable to meet certain standards and performance criteria, respondent was forced to terminate her. Admittedly, it is undisputed that claimant was unable to perform up to the necessary level in the last job as a stacker. The Board believes the respondent's decision to terminate claimant purportedly because of performance issues does not negate her claim for work disability benefits.

By its actions, respondent seems to concede claimant required accommodation following her release from Dr. Reed. Indeed, it seems unreasonable to assume that an employee who has had a ruptured disc and subsequent fusion could seamlessly return to her pre-surgery activities without some sort of modification or accommodation. Dr. Delgado imposed restrictions in February 2003 which were adopted by the ALJ.

Once claimant returned to work, she was allowed to choose a more sedentary position as a parts bagger as that job was consistent with the restrictions eventually imposed by Dr. Delgado. However, that job was outsourced leaving claimant without a job. The subsequent positions she held in the next few weeks and months were more physically demanding, both in terms of accuracy, speed and by the sheer lifting requirements. They continued to cause her increased symptoms of pain in her neck and shoulder.

As evidence of its attempt to retain her, respondent's counsel points to the list of jobs made available to claimant from which she could select an alternative assignment when it was clear she would be terminated from the stacker position. However, there is no evidence within the record that suggests that any of the jobs contained within this list were actually available to claimant, nor were they identified as being within Dr. Delgado's restrictions. The Board finds that simply providing a list of jobs that may or may not meet an employee's restrictions and may or may not be available is insufficient to establish accommodation under Kansas law. Claimant was terminated from an accommodated position. After being terminated from that position, she was entitled to a work disability.

For these reasons, the Board does not need to address the applicability of *Beck*.²¹ Here, unlike in *Beck*, claimant was able to perform the sedentary, obviously accommodated job of small bagger. When that job was outsourced and no longer available to her, she was forced to perform jobs that were far more physically demanding. It is uncontroverted that she could not sustain the level of performance necessary to retain

²¹ *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800 (2003).

at least two of those jobs. These facts distinguish the instant action from the rule set forth in *Beck*.

Even if the Board were to conclude that *Beck* was applicable, the Court of Appeals has recognized that when an injured claimant suffers a task loss that makes it more difficult to find a position in the open market for a comparable wage, there is a potential for work disability depending on the facts and circumstances.²² Given claimant's restrictions and the resulting task loss along with her demonstrable difficulty in securing employment, the ALJ's award of work disability is consistent with the holding in *Beck*. For these reasons, the ALJ's Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated February 16, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James L. Wisler, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

²² *Id.*